

Georgetown Environmental Law and Policy Institute's
Takings-Net

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To provide timely information about regulatory takings litigation, the Georgetown Environmental Law and Policy Institute provides brief summaries of very recently issued decisions and other important case developments. Past “snapshots” are collected on the GELPI website. As in the past, the cases are organized in rough order of their importance and interest value.

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Takings Snapshots, Volume 83, February 26, 2007

1. *Stockton East Water District v. United States*, No 94-541L (U.S.Ct.Fed.Cls. Feb. 20, 2007) (following a full trial, the U.S. Court of Federal Claims rejected the breach of contract and takings claims of Stockton East Water District and Central San Joaquin Water District based on the Bureau of Reclamation’s implementation of the environmental protection provisions of the Central Valley Project Improvement Act; the Districts claimed that the Bureau’s decision to reduce water deliveries for irrigation in order to protect fisheries violated their water supply contracts with the Bureau and took their property rights in the water; the Court rejected the plaintiffs’ convoluted contract claims on various grounds, in particular that the broad “shortage clause” in each contract protected the United States from liability; the Court rejected the takings claims on the ground that the Districts’ alleged property rights were based on their contracts and therefore their only remedy was a contract action) (GELPI filed an *amicus* brief in the case on behalf of the Natural Resources Defense Council, which is available on the GELPI website).

2. *Biddle v. BAA Indianapolis LLC*, 860 NE 2d 570 (Ind. Jan. 23, 2007) (in a thoughtful and learned opinion, the Indiana Supreme Court (Shepard, C.J.) affirmed a trial court ruling rejecting inverse condemnation claims by homeowners based on aircraft noise from airplanes taking off from a new runway at Indianapolis airport; the Court adopted the U.S. Court of Federal Claims approach for evaluating takings claims based on aircraft overflights, which presumes that there is no taking unless an aircraft’s flight through the navigable airspace above private property causes an effect on “so severe as to amount to practical destruction or substantial impairment” of the property; the Court ruled that the trial court reasonably concluded based on the evidence that the aircraft noise did not amount to a practical destruction or a substantial impairment of the plaintiffs’ property interests in their homes).

3. *CCA Associates v. United States*, 2007 WL 315350 (U.S. Ct. Cls. Jan. 31, 2007) (relying on the 2005 Federal Circuit decision in *Cienega Gardens*, the U.S. Court of Federal Claims found that a Louisiana partnership that owned federally subsidized low-

income housing suffered a taking under *Penn Central* as a result of 1987 federal legislation eliminating the owner's ability to prepay its mortgage and escape federal limitations on the rent it could charge tenants; in the crucial portion of the opinion, the Court chose a return on equity approach to measure economic impact, rather than the more traditional change in property value approach; this approach makes it far easier for claimants to demonstrate the level of economic injury necessary to support recovery under *Penn Central*).

4. *Border Business Park, Inc. v. City of San Diego*, 142 Cal. App.4th 1238 (Cal. Ct. App. Sept. 19, 2006) (reversing a trial court takings award of \$65.3 MILLION, the California Court of Appeals ruled that a takings claim based on a city's allegedly "unreasonable conduct" in proposing to use eminent domain to construct a new airport failed because the airport plan affected thousands of acres, not just plaintiff's 300 acres, and therefore did not "directly and specially" affect plaintiff; the Court of Appeals also rejected a takings claim based on the city's decision to re-route truck traffic so that it flowed past plaintiff's property, because the trucks did not cause complete gridlock barring all access to and from plaintiff's property).
5. *Seiber v. State of Oregon*, 149 P.3d 1243 (Or. Ct. App. Dec. 27, 2006) (applying the landmark 2005 Oregon Supreme Court decision in *Coast Range Conifers*, which affirmed that Oregon follows the traditional property as a whole rule in regulatory takings cases, the Oregon Court of Appeals reversed a takings award based on a seven-year restriction on logging in the area surrounding a spotted owl nesting site; the Court ruled that the restriction, which had the effect of temporarily prohibiting the landowners from logging on 20-percent of their property, did not effect a taking under *Penn Central*).
6. *Columbia River Gorge Commission v. Hood River County*, 2007 WL 404172 (Or. Ct. App. Feb. 7, 2007) (in an important case interpreting Oregon Measure 37, the Oregon Court of Appeals, affirming a trial court decision, ruled that Measure 37 does not apply to land use regulations in the Columbia River Gorge National Scenic Area, because county ordinances implementing the scenic area legislation and the scenic area management plan fall within the Measure 37 exception for land use regulations "required to comply with federal law").
7. *Hallco Texas Inc. v. McMullen County*, 2006 WL 3825298 (Tx. Dec. 29, 2006) (a sharply divided Texas Supreme Court rejected a landowner's claims under the federal Takings Clause, the Texas Takings Clause, and the Texas Real Property Rights Protection Act; the plaintiff's claims were based on a county ordinance prohibiting construction of industrial-waste landfills within three miles of a water supply reservoir; the Court ruled that the claims were barred by the doctrine of claim preclusion, given that the plaintiff had the opportunity to assert the same claims in a prior state litigation involving the same ordinance; the dissenters argued that the plaintiff should not have been barred from raising an as-applied takings challenge which, in their view, only became ripe after the conclusion of the prior litigation).

8. *Hill v. City of Bethlehem*, 909 A.2d 439 (Pa. Cmwlth. Oct. 12, 2006) (affirming a trial court ruling rejecting plaintiffs' petition claiming a de facto taking and demanding just compensation, the Pennsylvania Commonwealth Court ruled that a city did not take plaintiffs' property by ordering plaintiffs to vacate their home and by subsequently demolishing the building, which was not structurally sound and was in danger of imminent collapse; the Court reasoned that the city's action did not constitute a taking because the city was acting under its police power rather than under its eminent domain power).

9. *Besaro Mobile Home Park LLC v. City of Fremont*, 2006 WL 2990201 (N.D. Cal. Oct. 19, 2006) (reflecting the continuing confusion in the Ninth Circuit over the proper implementation of the U.S. Supreme Court's *Lingle* decision, the Federal District Court dismissed an amended complaint challenging a mobile home rent control law, ruling that (1) plaintiff's due process claim alleging that the ordinance did not serve a valid public purpose failed because the allegation was covered by the Takings Clause, (2) plaintiff's taking claim alleging a lack of a valid public purpose was ripe in federal court but was barred by the applicable statute of limitations, (3) plaintiff's claim of a constitutional entitlement to charge rent that reflects "general market conditions" was contrary to the numerous precedents rejecting constitutional challenges to rent control laws).

10. *S.G. Borello & Sons, Inc. v. City of Hayward*, 2006 WL 3365598 (N.D. Cal. Nov. 20, 2006) (in another confusing application of the Supreme Court's *Lingle* decision, the Federal District Court granted a city's motion to dismiss a due process challenge to a mobile home regulation, ruling that (1) after *Lingle*, a land use regulation can be challenged under the Due Process Clause rather than under the Takings Clause, (2) contrary to plaintiff's theory, the Due Process Clause does not provide a guarantee of a "reasonable rate of return," and (3) in any event, the claim was not ripe under the state-exhaustion prong of *Williamson County*, reasoning that *Williamson County* applied in this case because plaintiffs' inadequate rate of return claim "arose from a taking claim").

11. *MHC Financing Limited Partnership v. City of San Rafael*, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006) (in another case involving a mobile home rent control law, the Federal District Court, after concluding that plaintiff's claims were not barred by claim preclusion, the statute of limitations, or ripeness doctrine, (1) ruled that the Supreme Court's *Lingle* decision supercedes Ninth Circuit precedent barring due process claims based on this type of regulation, and (2) denied the city's motion for summary judgment on the due process claim, ruling that the plaintiff's allegation that the ordinance conferred a windfall on incumbent mobile home tenants but provided no protection to future mobile home tenants stated a viable claim, (3) granted the city's motion for summary judgment on a *per se* physical occupation theory and on plaintiff's *Nolan/Dolan* claims, and (4) denied the city's motion for summary judgment on plaintiff's claims that the ordinance effected a taking under *Penn Central* or constituted an invalid taking for private purposes in violation of the Takings Clause).

12. *Johns v. Black Hills Power*, 722 NW 2d 554 (S.D. Sept. 20, 2006) (the South

Dakota Supreme Court affirmed rejection of a taking claim based on a utility's placement of a pole and wire on plaintiff's property, ruling that plaintiff lacked standing because the pole and wire were installed when plaintiff's predecessor in interest owned the property; the Court thereby avoided the issue of the constitutionality of the state statute requiring utility customers to grant rights of way to electric utilities without compensation).

13. MCQ's Enterprises Inc. v. Philadelphia Parking Authority, 2007 WL 127728 (E.D.Pa. Jan. 11, 2007) (Federal District Court rejected Yellow Cab Company's request for a permanent injunction to block the City of Philadelphia's implementation of a universal cab dispatch system, which required that a generic GPS system be installed in each cab; the Court ruled that the plaintiff potentially could establish either a *per se* physical occupation taking or a taking under *Penn Central*, but that any valid taking claim could be remedied after the fact through payment of just compensation, and all of the other preliminary injunction factors weighed against entry of an injunction).

14. Neifert v. Department of the Environment, 910 A. 2nd 1100 (Md. Nov. 14, 2006) (affirming a trial court ruling, the Maryland Court of Appeals rejected a takings claim based on the Department of the Environment's denial of sewer service to certain properties and rejection of a wetland fill permit; the Court ruled that since the plaintiffs' lots had failed a "perc" test, the plaintiffs were barred under background principles of state law from claiming a right to develop the property; the Court also ruled that the plaintiffs could not claim a taking based on denial of their application to hook up to the local sewer system because there is no constitutionally protected right to sewer service; finally the Court rejected the takings claim based on the denial of the wetland permit because the properties were already undevelopable based on the results of the perc test).

15. Evans v. United States, 74 Fed. Cl. 554 (U.S. Ct. Cls. Dec. 22, 2006) (U.S. Court of Federal Claims granted government's motion to dismiss takings suit brought by California raisin growers who alleged that the Agricultural Marketing Act effected a taking by requiring the transfer of a portion of each grower's raisin crop to the Raisin Administrative Committee; the Court rejected plaintiffs' physical takings theory because plaintiffs retained title to the raisins; the Court rejected the regulatory takings theory on the ground that the law imposed a reasonable condition on individuals who voluntarily decide to enter the raisin business).

16. Furgeson v. City of Takoma, 2006 WL 3333046 (W.D. Wash. Nov. 15, 2006) (Federal District Court rejected claim that city's closure of plaintiff's bar due to various building code violations effected a taking, where it took one and one half months for the owner to complete the necessary repairs and reopen the bar; the District Court relied heavily on the statement in the Supreme Court's *Tahoe-Sierra* opinion that temporary business closures for health reasons do not constitute takings).

17. B&C Investments of Arkansas, Inc. v. City of Fort Smith, 2007 WL 215819 (W.D. Ark. Jan. 25, 2007) (Federal District Court rejected takings claim based on an assessment of the cost of road construction on adjacent property owners; the Court ruled that the

assessment was appropriately calculated under the standard articulated in *Norwood v. Baker*, 172 U.S. 269 (1898), and there was no taking because the cost of the improvements did not “substantially exceed” the value of the improvements to the plaintiff landowners; the Court stated that the standards for development exactions articulated in the Supreme Court’s *Dolan* and *Nolan* decisions are irrelevant to this type of assessment).

18. *Harris v. City of St. Clairsville*, 2006 WL 3791404 (S.D. Ohio Dec. 21, 2006) (Federal District Court granted city’s motion for summary judgment on land owner’s claim that city effected a taking by annexing and rezoning plaintiff’s property, ruling that plaintiff’s claim was not ripe in federal court under *Williamson County* and, in any event, (1) the takings claim failed because plaintiff’s substantially-advance takings theory was no longer viable following *Lingle* and (2) the economic burden imposed by the zoning regulation was not sufficiently onerous to support a traditional takings claim).

19. *Crosby v. Pickaway County General*, 2006 WL 3762123 (S.D. Ohio Dec. 20, 2006) (Federal District Court denied plaintiff’s motion for reconsideration of a ruling holding that plaintiff’s federal takings claim was not ripe under *Williamson County*, rejecting plaintiff’s argument that he was entitled to seek recovery of consequential damages in a regulatory takings case in federal court).

20. *Hammitt v. United States*, 2006 WL 3779499 (Fed. Cir. Dec. 26, 2006) (unpublished decision) (affirming a ruling by the claims court, the U.S. Court of Appeals for the Federal Circuit ruled that plaintiffs were barred from bringing a takings claim based on the alleged taking of their property as part of federal criminal proceeding because the procedures for challenging forfeitures in Federal District Court provide the sole avenue for owners to challenge these types of alleged takings).

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